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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE BETH LABSON FREEMAN

ARISTA NETWORKS, INC., )  
                            )  
PLAINTIFF,             )  
                            )  
VS.                      ) NO. C 16-CV-00923 BLF  
                            )  
CISCO SYSTEMS,         )  
                            )  
DEFENDANT.             ) SAN JOSE, CALIFORNIA  
                            )  
                            ) THURSDAY  
                            )  
                            ) MAY 26, 2016  
                            )  
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TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND

RECORDING 11:17 A.M. - 11:53 A.M.

APPEARANCES:

**FOR PLAINTIFF**

WILSON, SONSINI, GOODRICH & ROSATI  
1301 AVENUE OF THE AMERICAS  
40TH FLOOR

NEW YORK, NEW YORK 10019

BY: **JONATHAN M. JACOBSON, ESQUIRE**  
**CHUL PAK, ESQUIRE**

KEKER & VAN NEST, LLP  
633 BATTERY STREET  
SAN FRANCISCO, CALIFORNIA 94111

BY: **DAVID J. SILBERT, ESQUIRE**

(FURTHER APPEARANCES ON FOLLOWING PAGE)

**REPORTED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR**  
**RETired OFFICIAL COURT REPORTER, USDC**

**APPEARANCES (CONTINUED) :**

**FOR DEFENDANT:**

DESMARAIS LLP  
230 PARK AVENUE  
NEW YORK, NEW YORK 10169

**BY: JOHN M. DESMARAIS, ESQUIRE  
PAUL A. BONDOR, ESQUIRE  
TAMIR PACKIN, ESQUIRE**

**ALSO PRESENT:**

MARK TAXAY, ARISTA GENERAL COUNSEL

1 THURSDAY, MAY 26, 2016

11:17 A.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSEL'S FAILURE TO  
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER  
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

5

6 PROCEEDINGS

7 ---000---

8 **THE CLERK:** CALLING CASE 16-0923, ARISTA NETWORKS  
9 VERSUS CISCO SYSTEMS.

10 COUNSEL, PLEASE COME FORWARD AND STATE YOUR  
11 APPEARANCES.

12 **MR. DESMARAIS:** GOOD MORNING, YOUR HONOR. JOHN  
13 DESMARAIS ON BEHALF OF CISCO SYSTEMS.

14 **THE COURT:** HELLO, MR. DESMARAIS.

15 **MR. JACOBSON:** JONATHAN JACOBSON, WILSON SONSINI, FOR  
16 ARISTA. AND I'M JOINED TODAY BY MY PARTNER CHUL PAK. MARC  
17 TAXAY FROM THE COMPANY, AND DAVID SILBERT WHO I BELIEVE YOU  
18 KNOW FROM ANOTHER CASE.

19 **THE COURT:** YES, THAT'S RIGHT. GOOD MORNING TO ALL  
20 OF YOU.

21 (SIMULTANEOUS SPEAKING.)

22 **THE COURT:** ALL RIGHT. BEFORE I GET STARTED, LET ME  
23 JUST -- I DON'T ACTUALLY THINK THIS IS AN ISSUE OF CONCERN, BUT  
24 I BELIEVE IN DISCLOSURE. THE LAW CLERK WHO GENERALLY WORKS  
25 WITH ME ON THIS CASE CAME TO ME A YEAR AGO FROM COVINGTON &

1 BURLING, AND I KNOW THAT COVINGTON HAS BEEN ASSOCIATED ON THE  
2 CASE. AND HE'S GOING ON TO ANOTHER CLERKSHIP, SO HE'S NOT  
3 GOING RIGHT BACK TO COVINGTON AND I WANTED TO MAKE SURE NO ONE  
4 HAD ANY CONCERN ABOUT HIM WORKING ON THE CASE DURING THE LAST  
5 FEW WEEKS OF HIS TERM WITH ME.

6 **MR. DESMARAIS:** NO CONCERN, YOUR HONOR.

7 **MR. JACOBSON:** NO, NO, YOUR HONOR.

8 **THE COURT:** OKAY. THANK YOU. ALL RIGHT. THIS IS  
9 THE OTHER SIDE OF THE COIN HERE, AND YOU'VE TRADED PLACES AT  
10 THE PODIUM THERE, BUT I HAVE.

11 **MR. DESMARAIS:** JUST TEMPORARILY.

12 **THE COURT:** I KNOW, I KNOW. TRUST ME.

13 THIS CASE, I DON'T SEE ANY REASON IN GIVING PRIORITY  
14 TO IT THE WAY I DID FOR THE PATENT AND COPYRIGHT CASE.

15 **MR. JACOBSON:** CAN I ADDRESS YOUR HONOR?

16 **THE COURT:** SURE. WELL -- AND I HAVE NO ROOM IN MY  
17 SCHEDULE, BECAUSE -- YOU ABSOLUTELY CAN, MR. JACOBSON, BUT I  
18 TURNED MYSELF INSIDE OUT AND BUMPED OTHER CASES THAT ARE MUCH  
19 OLDER IN ORDER TO HAVE ONE CASE HEARD QUICKLY. SO LET ME  
20 HEAR --

21 **MR. JACOBSON:** I UNDERSTAND, BUT THAT WAS AT ARISTA'S  
22 EXPENSE, YOUR HONOR. THAT WAS NOT AT OUR REQUEST. AND THE  
23 URGENCY THAT CISCO URGED TO GET YOU TO DO THAT IS REALLY NOT  
24 THE CASE, BUT WHETHER IT IS OR NOT, THE URGENCY FOR ARISTA IS  
25 OVERWHELMING.

1                   CISCO, AS IT MAKES CLEAR FROM ITS PAPERS, IS TRYING  
2 TO PUT ARISTA OUT OF BUSINESS.

3                   **THE COURT:**    YEAH.

4                   **MR. JACOBSON:** THIS IS NOT SOMETHING THAT THE COMPANY  
5 REALLY CAN HAVE HANGING OVER ITS HEAD FOR AN INDEFINITE PERIOD  
6 OF TIME.    THE STAY REQUEST IS PART OF THAT, BUT WHETHER -- YOU  
7 KNOW, IF -- AND I HEARD YOU SAY, YOU KNOW, YOU WERE LOOKING AT  
8 AUGUST 2018.

9                   **THE COURT:**    I AM, YEAH.

10                  **MR. JACOBSON:** WE THINK THIS CASE CAN BE ADJUDICATED  
11 QUICKLY.    THE SCHEDULE WE'VE PUT TOGETHER IS A 23-MONTH  
12 SCHEDULE FROM THE FILING OF THE COMPLAINT.    CISCO, IN THE  
13 COPYRIGHT CASE, GOT 13 MONTHS, AND WHAT THEY'RE PROPOSING HERE  
14 IS 29 MONTHS.    AND THE DIFFERENCE IS, CANDIDLY, UNFAIR TO  
15 ARISTA, AND THERE'S NO REASON WHY OUR CASE SHOULD BE TREATED,  
16 YOU KNOW, FUNDAMENTALLY DIFFERENTLY THAN THE CASE THAT CISCO  
17 HAS BROUGHT.

18                  THIS IS A CASE, YOUR HONOR -- THIS IS THE FIRST TIME  
19 I'VE BEEN BEFORE YOU.

20                  **THE COURT:**    YEAH.

21                  **MR. JACOBSON:** THIS IS A CASE, YOUR HONOR, WHERE  
22 THERE IS INJURY, NOT ONLY TO ARISTA, WHICH IS BEING THREATENED  
23 BY BEING PUT OUT OF BUSINESS, BUT ALSO TO THE PUBLIC AS A  
24 WHOLE.

25                  YESTERDAY -- I DON'T KNOW IF YOUR HONOR HAS HAD A

1 CHANCE TO LOOK AT THE DOCUMENT -- AN AMICUS BRIEF WAS FILED BY  
2 STANFORD AND PUBLIC KNOWLEDGE TALKING ABOUT THE PUBLIC INTEREST  
3 IN THE CASE. AND IF THE INDUSTRY STANDARD CLI AND THE BUNDLING  
4 AND INTIMIDATION THREATS ARE ALLOWED TO CONTINUE AND ARISTA CAN  
5 NO LONGER COMPETE EFFECTIVELY, THEN THE ONLY EFFECTIVE  
6 COMPETITION FOR CISCO IS GOING TO BE THE OTHER SIX DWARVES WHO  
7 ARE GOING TO BE THREATENED WITH SIMILAR ACTIVITY BECAUSE, OTHER  
8 THAN JUNIPER, PRETTY MUCH EVERYONE IN THE INDUSTRY USES  
9 CISCO-LIKE CLI.

10 WE PUT IN OUR PAPERS, YOUR HONOR, THE FACT THAT  
11 CISCO-LIKE CLI IS OFTEN FOUND IN REQUESTS FOR PROPOSALS THAT  
12 FIRMS THAT ARE CONSIDERING ACQUIRING, YOU KNOW, ADDITIONAL  
13 SWITCHES.

14 SO, YOUR HONOR, WE DON'T THINK THERE'S ANY BASIS FOR  
15 A STAY. THE STAY HAS BEEN BRIEFED BY OUR SIDE. WE HAVE NOT  
16 YET GOTTEN COUNSEL'S REPLY BRIEF ON THE OTHER SIDE, BUT I THINK  
17 IF YOU CAN -- IF YOUR HONOR CAN SEE FIT TO GIVE US THE EARLIEST  
18 TRIAL DATE POSSIBLE, I'M KIND OF --

19 **THE COURT:** SO, MR. JACOBSON, WHAT WOULD BE YOUR  
20 IDEAL DATE FOR -- MONTH FOR TRIAL OF THIS CASE?

21 **MR. JACOBSON:** SO THE ONE THAT WE PUT IN OUR PORTION  
22 OF THE CMC.

23 **THE COURT:** I WAS LOOKING FOR IT. I COULDN'T -- I  
24 KEEP FLIPPING THROUGH --

25 **MR. JACOBSON:** JANUARY 2018, YOUR HONOR.

1                   **THE COURT:** JANUARY 2018?

2                   **MR. JACOBSON:** IT'S IN THE SCHEDULE AT THE VERY END  
3 OF THE DOCUMENT.

4                   **THE COURT:** I KNOW. THAT'S WHAT I WAS LOOKING FOR.

5                   **MR. DESMARAIS:** THERE IT IS, EXHIBIT A, YOUR HONOR.

6                   **THE COURT:** OH, I'M SORRY. IT'S EXHIBIT A. I JUST  
7 DIDN'T GET QUITE -- I SAW THE SIGNATURE LINE, AND -- I KNEW I  
8 READ IT LAST NIGHT. OKAY.

9                   **MR. JACOBSON:** JANUARY 15TH.

10                  **MR. DESMARAIS:** I'D LIKE TO BE HEARD ON THAT, YOUR  
11 HONOR.

12                  **THE COURT:** OKAY.

13                  **MR. DESMARAIS:** SO I THINK THE ARGUMENT THAT WAS JUST  
14 MADE HAS NO MERIT FOR SEVERAL FUNDAMENTAL REASONS.

15                  NUMBER ONE, IF THIS CASE WAS SO IMPORTANT TO ARISTA,  
16 WHY DID THEY WAIT SO LONG TO FILE IT? WHEN YOU LOOK AT WHAT  
17 THE MERITS OF THE COMPLAINT ARE, THEY'RE ARGUING THAT CISCO'S  
18 ENFORCEMENT OF ITS COPYRIGHTS IS WHAT GIVES THE BASIS FOR THE  
19 CHANGE OF POSITION. IT'S THE WHOLE FOUNDATION OF THE ANTITRUST  
20 CLAIM.

21                  WE SUED THEM YEARS AGO ON A COPYRIGHT. THE COPYRIGHT  
22 CASE HAS BEEN PENDING FOR A LONG TIME. THE PATENT CASE HAS  
23 BEEN PENDING FOR EVEN LONGER. THIS ISN'T A NEW CLAIM. IT'S AN  
24 OLD CLAIM THAT THEY JUST MADE SO IF IT WAS URGENT, THEY SHOULD  
25 HAVE FILED IT WHEN THEY HAD NOTICE OF CISCO'S ALLEGED CHANGE OF

1 POSITION.

2 BUT EVEN MORE FUNDAMENTALLY, IN THE COPYRIGHT CASE,  
3 WHICH YOUR HONOR IS GOING TO TRY IN NOVEMBER --

4 **THE COURT:** YEAH.

5 **MR. DESMARAIS:** -- THEIR AFFIRMATIVE DEFENSE OF  
6 EQUITABLE ESTOPPEL WILL PROTECT THEM IF THERE'S ANY MERIT TO  
7 THIS CLAIM.

8 **THE COURT:** YEAH.

9 **MR. DESMARAIS:** THIS CLAIM SAYS THAT CISCO DID ONE  
10 THING, ARISTA RELIED ON IT, AND THEN CISCO SWITCHED. THAT IS  
11 THEIR EQUITABLE ESTOPPEL DEFENSE. SO THEY WILL GET ALL THE  
12 RELIEF THEY NEED FROM THE COPYRIGHT CLAIM IN YOUR TRIAL IN  
13 NOVEMBER IF THERE'S ANY MERIT TO IT.

14 ALL THIS IS GOING TO ADD DAMAGES ON TOP OF THAT.  
15 IT'S NOT URGENT. THEY DON'T NEED THE DAMAGES NOW. AND THEY'VE  
16 WAITED A LONG TIME TO FILE THIS CASE.

17 BUT THERE'S ALSO A THIRD REASON, WHICH IS, YOU KNOW,  
18 NOT JUST THEIR DELAY, NOT JUST (UNINTELLIGIBLE) ISSUE IN  
19 NOVEMBER, BUT THE THIRD REASON IS THEY'RE FULLY BRIEFED IN OUR  
20 MOTION TO STAY, WHICH IS IF THE COPYRIGHT CASE IS SUCCESSFUL OR  
21 IF THE ITC ORDERS BECOME FILE, THEY HAVE NO BASES FOR THEIR  
22 ANTITRUST CLAIM AT ALL, BECAUSE THEY'RE NOT PROPERLY ON THE  
23 MARKET, AND THIS HAS ALL BEEN BRIEFED. I DON'T WANT TO ARGUE  
24 THE STAY MOTION.

25 **THE COURT:** AND, YOU KNOW, THE STAY MOTION DOESN'T

1 COME UP TILL AUGUST.

2 **MR. DESMARAIS:** THAT'S CORRECT.

3 **THE COURT:** AND I'M NOT HEARING THAT TODAY, ALTHOUGH  
4 I CERTAINLY APPRECIATE THAT THAT IS ON MY DOCKET.

5 **MR. DESMARAIS:** THERE IS ONE THING I WANTED TO SAY  
6 ABOUT THAT.

7 **THE COURT:** YEAH.

8 **MR. DESMARAIS:** WHICH IS I WOULD LIKE TO ASK TODAY  
9 FORMALY TO HAVE THE COURT -- SO DISCOVERY HAS ALREADY GOT  
10 UNDERWAY.

11 **THE COURT:** GOOD.

12 **MR. DESMARAIS:** WE EXCHANGED INITIAL DISCLOSURES. WE  
13 SERVED DOCUMENT REQUESTS AND INTERROGATORIES. BUT THAT WILL BE  
14 A COLOSSAL WASTE OF RESOURCES FOR BOTH COMPANIES. AND THERE IS  
15 GOING TO BE DISCOVERY DISPUTES, SO IT WILL BE A WASTE OF THE  
16 COURT'S RESOURCES.

17 WE WOULD ARGUE TODAY AND ASK THE COURT'S INDULGENCE  
18 TO STAY THAT DOCUMENT DISCOVERY AND (UNINTELLIGIBLE) DISCOVERY  
19 UNTIL YOU HEAR THE FORMAL STAY MOTION IN AUGUST, WHICH IS ONLY  
20 TWO MONTHS FROM NOW. AND IT'S GOING TO BE A COLOSSAL WASTE OF  
21 RESOURCES IF THE COMPANY IS -- THESE TWO COMPANIES ARE  
22 COLLECTING DOCUMENTS YET AGAIN AND HAVING US WRITE  
23 (UNINTELLIGIBLE) AND NOTICING DEPOSITIONS, AND THERE'S GOING TO  
24 BE DISPUTES ABOUT THE SCOPE.

25 AND I CAN TELL YOU IN JUST TWO SECONDS THE NATURE OF

1 THE STAY MOTION? IN JUNE THE ITC ORDER WILL BECOME FINAL.  
2 ARISTA WILL BE BARRED FROM THE MARKET IN THE UNITED STATES.

3           **THE COURT:** WELL, THAT WILL CHANGE THINGS, WON'T IT,  
4 IF THAT HAPPENS.

5           **MR. DESMARAIS:** THERE'S NO ANTITRUST ACTION IF THAT  
6 HAPPENS.

7           SECONDARILY, YOU'RE TRYING IN NOVEMBER THE CLI CASE.  
8 AND IF THEY'RE FOUND LIABLE THERE, THERE'S NO BASIS FOR -- SO  
9 THE IDEA THAT WE WOULD START WASTING MONEY ON THIS ANTITRUST  
10 CLAIM WHEN IT'S NOT AN ORIGINAL CLAIM, BECAUSE YOU'RE GOING TO  
11 RESOLVE EQUITABLE ESTOPPEL AT THE TRIAL, WHICH IS THE SAME BASE  
12 OF FACT.

13           WHAT ARE WE DOING? WHY ARE WE WASTING YOUR TIME, OUR  
14 TIME, OUR CLIENT'S MONEY? WHY? IT SEEMS SILLY TO UNDERTAKE  
15 THIS NOW WHEN WE'RE JUST ASKING FOR A FEW MONTHS. SO WE SET UP  
16 OUR SCHEDULE WITH -- WE KNEW YOUR HONOR'S TRIAL DATE WAS SUMMER  
17 OF 2018.

18           **THE COURT:** YEAH.

19           **MR. DESMARAIS:** AND YOU'LL NOTICE THE WAY WE LAID OUT  
20 OUR SCHEDULE, WE DON'T -- AND THIS IS THE SCHEDULE THAT'S  
21 DEFENDANTS MADE -- WE DON'T START DISCOVERY UNTIL JANUARY. SO  
22 WE LAID OUT ALL THE DATES, BUT WE START THE DISCOVERY IN  
23 JANUARY. THAT GIVES TIME FOR THE ITC TO BECOME FINAL. IT  
24 GIVES TIME FOR YOUR NOVEMBER TRIAL TO BECOME FINAL. AND AT  
25 THAT POINT, WE CAN ALL TAKE A BREATH AND SEE IF THERE IS ANY

1 ANTITRUST CLAIM.

2 WE START DISCOVERY IN JANUARY. AND WE'VE GIVEN THE  
3 SAME AMOUNT OF DISCOVERY HERE THAT THEY GIVE IN THEIR SCHEDULE,  
4 SO WE'RE NOT CONDENSING THE DISCOVERY AMOUNT OF TIME, AND IT  
5 WORKS OUT NICELY SO THAT THE TRIAL WILL THEN BE IN JULY.

6 SO WE THINK THAT FROM A JUDICIAL ECONOMY POINT OF  
7 VIEW, FROM A PARTIES' RESOURCES POINT OF VIEW, IT GETS THE JOB  
8 DONE, AND THEY'RE GOING TO ADJUDICATE THEIR EQUITABLE ESTOPPEL  
9 IN NOVEMBER WHEN WE'RE HERE.

10 **MR. JACOBSON:** YOUR HONOR, CAN I RESPOND?

11 **THE COURT:** SURE.

12 **MR. JACOBSON:** I KNOW YOUR HONOR HAS A QUESTION, AND  
13 I'LL BE HAPPY TO ANSWER IT, TOO.

14 **THE COURT:** I'LL PROBABLY FORGET IT BY THE TIME...

15 **MR. JACOBSON:** EVERYTHING YOU JUST HEARD, EVERYTHING  
16 IS COMPLETELY WRONG AND LET ME EXPLAIN WHY.

17 WHY DID WE WAIT SO LONG TO BRING THE CASE? THE  
18 DISCOVERY IN THE CLI CASE WAS IMPORTANT. CERTAINLY, WE  
19 COULDN'T BRING IT UNTIL WE HAD HAD THAT. BUT MUCH MORE  
20 IMPORTANTLY, THE DECISION TO BRING AN ANTITRUST CASE IS A MAJOR  
21 CORPORATE DECISION.

22 **THE COURT:** SURE.

23 **MR. JACOBSON:** IT IS AN INVESTMENT OF MANY MILLIONS  
24 OF DOLLARS. IT IS NOT DONE LIGHTLY.

25 IN THIS CASE, IT WAS DONE ONLY AFTER THE FAR MORE

1 RECENT DISCOVERY OF THE SMARTNET BUNDLED PRICING AND THE  
2 INTIMIDATION OF OUR CUSTOMERS AND SUPPLIERS. THAT'S WHAT MADE  
3 IT URGENT. THAT'S WHY IT WAS FILED WHEN IT WAS. THAT IS THE  
4 SAME URGENCY THAT I MENTIONED BEFORE.

5 SECOND, EQUITABLE ESTOPPEL. YOUR HONOR MAY NEVER  
6 REACH EQUITABLE ESTOPPEL IN THAT CASE, AND EVEN IF YOU DO, FOR  
7 REASONS THAT WE LAY OUT IN OUR BRIEF, THERE IS NO WAY THAT THE  
8 DETERMINATION ON EQUITABLE ESTOPPEL CAN BE COLLATERAL ESTOPPEL  
9 IN THE ANTITRUST CASE.

10 AND, VERY BRIEFLY -- AND YOUR HONOR WILL GO INTO  
11 THIS, I KNOW, IN AUGUST OF 2018. EQUITABLE ESTOPPEL IS  
12 BASICALLY FOOLING ARISTA. THE ANTITRUST CLAIM IS FOOLING THE  
13 INDUSTRY. FUNDAMENTALLY DIFFERENT. AND WE HAVE A JURY TRIAL  
14 RIGHT ON THAT CLAIM THAT REALLY CANNOT FAIRLY BE REMOVED  
15 THROUGH AN EQUITABLE DETERMINATION ON EQUITABLE ESTOPPEL. SO  
16 THERE'S NO CHANCE OF THAT.

17 THE ITC CASES, THEY'RE ASSUMING THAT WE DON'T HAVE  
18 WORKAROUNDS ON THEIR PATENTS.

19 **THE COURT:** THEY DIDN'T MENTION THAT IN THEIR PAPERS.

20 **MR. JACOBSON:** AND WE DO. WE DO. THERE'S NO WAY THE  
21 ITC CASE IS GOING TO PUT ARISTA OUT OF BUSINESS.

22 THE COPYRIGHT CASE, LET'S SAY THEY WIN THE COPYRIGHT  
23 CASE. THAT'S NOT A DEFENSE IN THE ANTITRUST CASE. THAT IS THE  
24 SQUARE HOLDING OF THE *MICROSOFT* DECISION THE EN BANC DECISION  
25 OF THE D.C. CIRCUIT.

1 SO NONE OF -- THIS CASE IS GOING TO PROCEED, YOU  
2 KNOW, SUBJECT TO DISPOSITIVE MOTIONS, WHICH WE'RE CONFIDENT OF  
3 PREVAILING ON, BUT THERE'S NO -- THERE'S NO WAY TO SAY THAT THE  
4 INTELLECTUAL PROPERTY CASES ARE GOING TO BE THE END OF THIS  
5 CASE, THEY'RE JUST NOT.

6 **MR. DESMARAIS:** I HAVE A RESPONSE TO THAT ON  
7 (UNINTELLIGIBLE) GROUND, YOUR HONOR.

8 (SIMULTANEOUS SPEAKING.)

9 **MR. JACOBSON:** BUT --

10 **MR. DESMARAIS:** I'M SORRY --

11 **MR. JACOBSON:** I'M JUST IN THE MIDDLE OF MY RESPONSE.

12 **MR. DESMARAIS:** I DIDN'T MEAN TO INTERRUPT YOU. YOU  
13 WERE TAKING A BREATH.

14 **MR. JACOBSON:** SO THE PAPER DISCOVERY, IF WE'RE GOING  
15 TO HAVE A TRIAL DATE IN THE SUMMER, WHICH, YOU KNOW, WE REALLY  
16 DON'T WANT FOR ALL THE REASONS I'M TALKING ABOUT, EVEN IF THAT  
17 IS THE TRIAL DATE, WE NEED TO COMMENCE THE DISCOVERY NOW. THE  
18 DISCOVERY IS PAPER DISCOVERY. OF COURSE THERE ARE GOING TO BE  
19 DISPUTES, BUT BOTH SIDES PROVIDED YOUR HONOR WITH QUITE  
20 COMPRESSED SCHEDULES. WE DID SO TO GET AN EARLY TRIAL DATE.  
21 CISCO DID SO TO ACCOMMODATE THE STAY THAT IT'S SEEKING AND THE  
22 JULY 2018 TRIAL DATE.

23 IF THE TRIAL DATE IS NOT GOING TO BE IN JANUARY,  
24 THERE'S STILL NO REASON -- IT'S WRITTEN DISCOVERY. ALL RIGHT?  
25 THE DEPOSITIONS AREN'T GOING TO TAKE PLACE UNTIL BOTH SIDES

1 HAVE SEEN THE DOCUMENTS. THE WRITTEN DISCOVERY IS GOING TO  
2 PROCEED. THERE'S NO REASON TO DELAY IT. AT THIS POINT, IT'S  
3 PURELY PREJUDICIAL TO ARISTA. AND A LOT OF THE DISCOVERY --  
4 THEY'VE BEEN TAKING DISCOVERY ON THE ANTITRUST ISSUES IN THE  
5 COPYRIGHT CASE. THEY'VE TAKEN --

6           **THE COURT:** WELL, THAT ALWAYS HAPPENS.

7           **MR. JACOBSON:** BUT THESE ARE ISSUES THAT HAVE NO  
8 RELATIONSHIP TO THE CLI. THEY'VE BEEN ASKING OUR FOLKS ABOUT  
9 THE BUNDLING CLAIM, ABOUT THE SMARTNET CLAIM, AND YET THEY'RE  
10 TRYING TO PREVENT US FROM TAKING DISCOVERY ON THOSE ISSUES HERE  
11 IT. JUST DOESN'T MAKE ANY SENSE. IT'S COMPLETELY UNFAIR.

12           **THE COURT:** WELL, I'M NOT GOING TO IMPOSE ANY STAY  
13 UNTIL THE MOTION IS HEARD. I'M JUST NOT PREPARED TO DO THAT.

14           **MR. JACOBSON:** THANK YOU.

15           **THE COURT:** I'M NOT GOING TO PREJUDGE THE  
16 APPROPRIATENESS OF THE STAY WHEN I HEAR THAT MOTION.

17           MR. JACOBSON, I WISH MY CALENDAR WEREN'T SO IMPACTED.  
18 AND I -- IF I WERE TO GIVE YOU A JANUARY DATE, YOU'D BE THE  
19 THIRD TRIAL SET, AND I CAN'T GUARANTEE YOU'D GO OUT TO TRIAL.  
20 AND THEN IF YOU LOSE THAT TRIAL DATE, YOU MIGHT BE A YEAR AND A  
21 HALF BEFORE I GET YOU BACK IN. THAT'S THE REALITY OF MY  
22 CALENDAR, AND THAT'S WHAT I LOOK AT.

23           WHAT I WAS PLANNING TO DO WAS TO GIVE YOU A DATE IN  
24 AUGUST. SO THAT'S EIGHT MONTHS LATER. I RECOGNIZE THAT'S A  
25 LONG TIME. BUT THEN TO SET NO OTHER CASES ON THE TWO WEEKS I

1 WOULD ALLOW FOR THIS TRIAL.

2 SO, YOU KNOW, THAT'S -- YOU KNOW, TO BE ASSURED OF A  
3 TRIAL DATE THAT'S YOURS ALONE, AND IF YOU SETTLE, OF COURSE NO  
4 OFFENSE TAKEN.

5 BUT I ACTUALLY HAVE CONCERN THAT -- AND I JUST HAD A  
6 CASE THAT WAS TWO CASES SET FOR TRIAL THE SAME DAY, THE OLDER  
7 CASE WENT, BUMPED OUT THE OTHER ONE. I WAS ABLE TO OFFER THEM  
8 A DATE IN JUNE. THEY WEREN'T AVAILABLE. I HAVEN'T RESET THE  
9 TRIAL DATE, AND THEY MAY BE DELAYED A YEAR BEFORE I CAN GET  
10 THEM IN REASONABLY TO BE THE FIRST ONE UP BUT NEVER TO HAVE THE  
11 DATE THEMSELVES.

12 AND SO, YOU KNOW, I'M LOOKING AT MY JANUARY CALENDAR,  
13 AND I SEE CASES, CIVIL RIGHTS CASES, THAT ARE, FRANKLY, MORE  
14 IMPORTANT, BECAUSE THEY'RE OLD AND BECAUSE INDIVIDUALS WHO HAVE  
15 BEEN HARMED ARE WAITING FOR THEIR TRIAL DATE. AND SO, YOU  
16 KNOW, I DON'T SEE A DATE IN JANUARY, FEBRUARY WHERE YOUR CASE  
17 WOULD COME UP FIRST, BECAUSE I CAN'T GIVE IT TO YOU ALONE.  
18 THAT'S MY PROBLEM. AND, FRANKLY, THE COST TO YOUR CLIENTS OF  
19 BEING READY FOR TRIAL AND THEN BEING BUMPED FOR SIX MONTHS IS  
20 PRETTY SIGNIFICANT.

21 **MR. DESMARAIS:** YOUR HONOR, THIS IS THE KIND OF CASE  
22 THAT'S GOING TO HAVE A LOT EXPERT TESTIMONY, AND THESE EXPERTS,  
23 A LOT OF THEM ARE PROFESSORS. AND, YOU KNOW, TO HAVE A DATE  
24 AND THEN MOVE THE DATE AND THEN MOVE THE DATE -- TO FIND A NEW  
25 DATE WILL BE IMPOSSIBLE.

1                   **THE COURT:** WELL, I RECOGNIZE THAT, AND I AM -- I TRY  
2 TO BE GENEROUS IN MY RESETTING OF THE CASE BECAUSE YOU HAVE SO  
3 MANY MOVING PARTS. BUT, YOU KNOW, GONE ARE THE DAYS WHEN YOU  
4 JUST SAT IN THE COURTHOUSE DAY AFTER DAY UNTIL THE CASE BEFORE  
5 YOU WAS FINISHED. SO, WHAT I WAS INCLINED TO DO WAS TO SET  
6 THIS FOR AUGUST 6TH OF 2018, AND THEN I WOULD SET NO OTHER  
7 CASES.

8                   **MR. DESMARAIS:** THAT WORKS FOR CISCO, YOUR HONOR.

9                   **THE COURT:** OKAY.

10                  **MR. JACOBSON:** IT REALLY DOESN'T FOR ARISTA, YOUR  
11 HONOR, FOR THE REASONS THAT I ARTICULATED BEFORE. YES, WE  
12 UNDERSTAND THAT THERE'S A RISK, AND THAT IS CERTAINLY  
13 COUNTERBALANCED BY THE CERTAINTY OF AN AUGUST '18 TRIAL DATE.  
14 BUT THE HARM TO MY CLIENT IS CONTINUING.

15                  AND, YOUR HONOR, I'VE SPENT QUITE A BIT OF MY CAREER  
16 DOING CIVIL CASES PRO BONO.

17                  **THE COURT:** YEAH.

18                  **MR. JACOBSON:** I COMPLETELY SUPPORT THE PROPOSITION  
19 THAT THOSE CASES ARE IMPORTANT, AND THE RIGHTS OF THE  
20 INDIVIDUALS ARE FUNDAMENTAL TO OUR JUDICIAL SYSTEM, BUT THIS IS  
21 A CASE -- I REALLY DON'T WANT TO LEAVE YOU WITH ANY OTHER  
22 IMPRESSION. THIS AFFECTS SILICON VALLEY. RIGHT? THIS CASE --  
23 NETWORKING IS CENTRAL TO THE ENTIRE OPERATION OF EVERYTHING  
24 THAT GOES ON IN SILICON VALLEY, AND TO HAVE A MONOPOLIST OF  
25 ETHERNET SWITCHES, YOU KNOW, GO, YOU KNOW, UNCORRECTED IS GOING

1 TO BE HARMFUL TO EVERYONE, LARGELY FOR THE REASONS THAT WERE  
2 SET FORTH IN THE AMICUS BRIEF FILED LAST NIGHT.

3 **MR. DESMARAIS:** YOUR HONOR, I --

4 **THE COURT:** WHICH, OF COURSE, I -- IT'S NOT  
5 ASSOCIATED TO ANYTHING. I MEAN, I DON'T EVEN KNOW THAT I'LL  
6 ALLOW THAT BRIEF, BECAUSE -- I MEAN, SOMEONE COULD MAIL ME A  
7 LAW REVIEW ARTICLE, BUT I WAS A LITTLE SURPRISED TO GET AN  
8 AMICUS BRIEF JUST FOR MY EDIFICATION. I'M NOT DECIDING  
9 ANYTHING NOW. I AM AWARE THAT THERE WAS A REQUEST TO RECEIVE  
10 IT. I WAS WAITING TO SEE IF THERE WAS ANY OPPOSITION. I MEAN,  
11 IF THERE'S NO OPPOSITION --

12 **MR. DESMARAIS:** WE'RE GOING TO TALK ABOUT THAT TODAY,  
13 YOUR HONOR.

14 **THE COURT:** OKAY.

15 **MR. DESMARAIS:** BUT JUST TO RESPOND TO MR. JACOBSON'S  
16 COMMENT, AND TO REITERATE, YOU ARE GOING TO RESOLVE THE MERITS  
17 OF HIS BASIC BEEF WITH CISCO AT THE NOVEMBER TRIAL. HIS  
18 EQUITABLE ESTOPPEL DEFENSE, WHILE IT MAY OR MAY NOT BE  
19 PRECLUSIVE OF THE ANTITRUST, IF IT HAS ANY MERIT --

20 **THE COURT:** IT WILL --

21 **MR. DESMARAIS:** -- YOU'RE GOING TO DECIDE IT. AND IF  
22 YOU DECIDE IT IN THEIR FAVOR, THEY GET ALL THE RELIEF THEY  
23 NEED. EQUITABLE ESTOPPEL WILL PREVENT CISCO FROM ENFORCING ITS  
24 COPYRIGHTS IN THE CLI. SO HIS CLIENT IS GOING TO GET THEIR DAY  
25 IN COURT. HE WILL (UNINTELLIGIBLE). SO IT DOESN'T MAKE ANY

1 SENSE THAT WE WOULD STAND ON OUR HEAD TO TRY TO SCHEDULE THIS  
2 THING ON TOP OF THREE OTHER TRIALS.

3           **THE COURT:** I MEAN, THE OTHER PROBLEM I HAVE,  
4 MR. JACOBSON, IS SCHEDULING WHICH WILL NO DOUBT KNOCKDOWN  
5 DRAG-OUT FIGHTS ON *DAUBERT MOTIONS*, SUMMARY JUDGMENT MOTIONS.  
6 I HAVE COME TO EXPECT TWO ROUNDS OF *DAUBERT MOTIONS* AT THE  
7 SUMMARY JUDGMENT STAGE AND AT TRIAL.

8           AND SO, FRANKLY, I REGRET PERSONALLY THAT I SCHEDULED  
9 THE OTHER CASE SO QUICKLY, BECAUSE IT'S VERY HARD TO  
10 ACCOMMODATE IT. YOU DIDN'T WANT IT, I KNOW THAT, BUT THAT  
11 IS -- THAT IS A -- THAT'S VERY DIFFICULT, AND I JUST CAN'T TURN  
12 THE SCHEDULE INSIDE OUT ON OTHER CASES FOR PARTIES WHO HAD TO  
13 WAIT TWO YEARS AND THEN TO BE KICKED BY PARTIES WHO HAVE NOT  
14 WAITED AS LONG IS DIFFICULT.

15           AND THE OTHER THING IS, IT'S -- YOU KNOW, I GENERALLY  
16 TRY TO DECIDE WHICH CASE IS MORE IMPORTANT BY WHICH ONE IS  
17 OLDER, BECAUSE THE LITIGANTS RIGHTFULLY FEEL THAT THEIR CASE IS  
18 IMPORTANT, AND ONCE I START VALUING ONE PLAINTIFF'S CLAIMS  
19 AGAINST ANOTHER, WE'VE LOST EVERYTHING.

20           **MR. JACOBSON:** YOUR HONOR, THAT I COMPLETELY GET, AND  
21 I DON'T MEAN TO SUGGEST OTHERWISE.

22           **THE COURT:** I KNOW.

23           ALL RIGHT. SO THERE WILL BE NO STAY IN THE DISCOVERY  
24 AT THIS POINT, AND I'M ONLY CONSIDERING A REQUEST BY  
25 MR. DEMARAIS FOR A STAY PENDING THE MOTION. I'M NOT DECIDING

1 THE MOTION. THIS IS NOT WITH PREJUDICE. BUT IT'S JUST NOT  
2 BEFORE ME. SO I'M NOT GOING TO DO THAT.

3 I AM GOING TO SET YOUR TRIAL. YOU CAN TELL YOUR  
4 FAMILIES THAT THEY WON'T BE ENJOYING VACATION WITH YOU IN  
5 AUGUST OF 2018.

6 I AM GOING -- I'M GOING TO SET THIS -- I'M ACTUALLY  
7 GOING TO SET THIS -- WHAT I LIKE TO DO IS TO HAVE YOU COME IN  
8 ON A FRIDAY FOR -- BECAUSE NO DOUBT YOU'LL WANT A JURY  
9 QUESTIONNAIRE.

10 **MR. DESMARAIS:** YES.

11 **THE COURT:** AND SO WHAT I HAVE FOUND WORKS WELL IS TO  
12 HAVE THE JURY PANEL COME IN ON THE FRIDAY BEFORE. WE DO THE  
13 INITIAL HARDSHIP AND THE QUESTIONNAIRE, WHICH THEN GIVES YOU  
14 THE WEEKEND TO REVIEW IT. AND THEN ON MONDAY MORNING, WE GO  
15 RIGHT INTO THE VOIR DIRE, AND THAT JURY PANEL IS GENERALLY  
16 IMPANELED BY 10:30 IN THE MORNING AND YOU GO RIGHT INTO OPENING  
17 STATEMENTS. I FOUND THAT TO BE VERY EFFICIENT.

18 SO IF YOU WOULD PLAN ON AUGUST 3RD AS THE START OF  
19 TRIAL, BUT THAT'S ONLY JURY SELECTION, THAT'S NOT WITNESSES AT  
20 ALL.

21 **MR. JACOBSON:** YES.

22 **THE COURT:** YOU'LL ONLY BE HERE FOR A COUPLE OF  
23 HOURS. IF WE HAVE SOME MORE CLEANUP WORK ON PRETRIAL THINGS,  
24 WE CAN TAKE CARE OF THOSE.

25 I'M GOING TO SET YOUR PRETRIAL CONFERENCE ON JUNE 28

1 AT 1:30.

2 **MR. JACOBSON:** JUNE 28?

3 **THE COURT:** YES. WE'RE TALKING ABOUT 2018.

4 **MR. JACOBSON:** OKAY.

5 **THE COURT:** AND I'M GOING TO SET THE HEARING ON YOUR  
6 MOTION FOR SUMMARY JUDGMENT ON APRIL 5TH, 2018.

7 **MR. DESMARAIS:** 5TH?

8 **THE COURT:** APRIL 5.

9 **MR. DESMARAIS:** YES.

10 **MR. JACOBSON:** YOUR HONOR, I NEED TO CHECK MY  
11 SCHEDULE ON THAT.

12 **THE COURT:** OKAY.

13 **MR. JACOBSON:** I'M GOING TO BE THE CHAIR OF THE  
14 SECTION OF ANTITRUST LAW AT THE ABA, AND THAT IS TYPICALLY WHEN  
15 WE HAVE OUR SPRING MEETING, AND I EXPECT TO BE FULLY OCCUPIED.

16 **THE COURT:** IN APRIL, IS THAT --

17 **MR. JACOBSON:** WELL, IT'S -- USUALLY, IT'S THE LAST  
18 WEEK OF MARCH OR THE FIRST WEEK OF APRIL. I HONESTLY DON'T  
19 HAVE IT IN FRONT OF ME, BUT --

20 **THE COURT:** SO I WOULD RATHER GIVE YOU A DIFFERENT  
21 DATE NOW BECAUSE THAT CALENDAR FILLS UP AS WELL. WOULD THE  
22 12TH WORK? ONE WEEK LATER, IS THAT STILL --

23 **MR. JACOBSON:** I THINK SO, BUT CAN I GET BACK TO THE  
24 COURT ON --

25 **THE COURT:** YES. BUT CAN WE -- WHICH IS MORE LIKELY,

1 THE 12TH?

2 **MR. JACOBSON:** THE 12TH IS MORE LIKELY TO BE OKAY.

3 IF WE COULD DO THE 19TH.

4 **THE COURT:** I CAN DO THE 19TH.

5 **MR. JACOBSON:** THAT I CAN GUARANTEE I WILL BE  
6 AVAILABLE.

7 **THE COURT:** MR. DEMARAIS, IS THAT ALL RIGHT?

8 **MR. DESMARAIS:** THAT'S FINE, YOUR HONOR. WHAT TIME?

9 **THE COURT:** THAT'S AT 9:00 O'CLOCK. THAT'S ON THE  
10 REGULAR MOTIONS CALENDAR. NOW --

11 **MR. JACOBSON:** THERE'S ONE OTHER ISSUE, YOUR HONOR,  
12 WHICH IS THE NUMBER OF DEPOSITIONS THAT THE PARTIES --

13 **THE COURT:** RIGHT. LET ME JUST FINISH THE SCHEDULE,  
14 AND THAT IS AN ISSUE I WANT TO DEAL WITH.

15 I DO NOT DO DAUBERT MOTIONS AT THE PRETRIAL.

16 **MR. DESMARAIS:** WE'RE MOST ASSUREDLY GOING TO HAVE  
17 SOME, YOUR HONOR.

18 **THE COURT:** I KNOW YOU WILL. BUT I WANT TO BE CLEAR  
19 THAT THE LAST HEARING THAT I WILL HAVE BEFORE TRIAL IS THE  
20 JUNE 28 PRETRIAL CONFERENCE.

21 AND IF YOU HAVE DAUBERT, I TRY TO SCHEDULE THOSE ON A  
22 FRIDAY, SOMETIMES THEY INVOLVE TESTIMONY, MORE OFTEN NOT. BUT  
23 YOU DON'T KNOW YET. YOU HAVE BARELY BEGUN TO LOOK AT WHAT  
24 EXPERTS YOU'D NEED.

25 SO I NEED YOU TO -- SO I'M NOT GOING TO SCHEDULE

1 DAUBERTS. I JUST CAN'T. I DON'T KNOW WHAT THE SCOPE WILL BE,  
2 BUT I JUST WANTED TO BE CLEAR WITH YOU IT'S GOING TO HAVE TO BE  
3 BEFORE JUNE 28TH.

4 **MR. DESMARAIS:** YES, YOUR HONOR.

5 **THE COURT:** AND YOU NEED TO CONTACT MY COURTROOM  
6 DEPUTY AS EARLY AS POSSIBLE TO TRY TO GET A DATE FOR THAT.

7 NOW, ON THE SUMMARY JUDGMENT MOTION, THAT'S THE  
8 HEARING DATE, I'M GOING TO HAVE YOU NOW MEET AND CONFER AND  
9 WORK OUT THE REST OF THE CASE SCHEDULE FOR DISCOVERY CUTOFFS  
10 WITH THESE DATES IN MIND. AND I URGE YOU TO WORK OUT A  
11 REASONABLE BRIEFING SCHEDULE ON THE SUMMARY JUDGMENT. AND IF  
12 YOU WANT TO GO AHEAD AND SET A DAUBERT DATE AND BRIEFING ON  
13 THAT, YOU'RE WELCOME TO. I JUST FELT IT WOULD BE ARBITRARY IF  
14 I TRIED TO DO IT RIGHT NOW.

15 NOW, THERE IS A QUESTION ON THE NUMBER OF  
16 DEPOSITIONS. I FEEL LIKE I'VE BEEN DOWN THIS ROAD BEFORE.

17 **MR. JACOBSON:** I'M SURE YOU HAVE, YOUR HONOR. BUT IF  
18 YOU LOOK AT THE 26(A) DISCLOSURES IN THIS CASE, BETWEEN THE TWO  
19 PARTIES WE IDENTIFY OVER 40 WITNESSES.

20 **THE COURT:** YEAH.

21 **MR. JACOBSON:** AND SO TEN PER SIDE JUST SEEMS SILLY.

22 **THE COURT:** SO IT PROBABLY IS.

23 **MR. DESMARAIS:** (UNINTELLIGIBLE), YOUR HONOR, DON'T  
24 FORGET WE HAVE BEEN LITIGATING FOR YEARS. MANY OF THESE PEOPLE  
25 HAVE ALREADY BEEN DEPOSED. RIGHT? SO WE'VE TWO ITC CASES GO

1 FULL THROUGH DISCOVERY. WE'VE HAD THE CLI CASE WITH YOUR HONOR  
2 GO FULL THROUGH DISCOVERY. AT SOME POINT WE DON'T HAVE TO  
3 DEPOSE EVERYBODY IN THE COMPANY. THESE DEPOSITIONS SHOULD BE  
4 JUST NEW PEOPLE ON NEW ISSUES, NOT REPLAYING OLD GROUND.

5 **THE COURT:** SO, MR. JACOBSON, I'M GOING TO ASK, AS I  
6 DID IN THE OTHER CASE, THAT YOU LINE UP YOUR MOST IMPORTANT  
7 DEPONENTS AS YOUR FIRST TEN, BECAUSE YOU CAN NEVER BE SURE I'LL  
8 GIVE YOU MORE. YOU'RE ASKING FOR 30 AT THIS POINT. AND AS I  
9 DID BEFORE, I'M GOING TO NEED TO SEE A LIST OF WHO THE  
10 DEPONENTS WOULD BE AND WHY THEY'RE SO IMPORTANT AND WHY THEY  
11 AREN'T PART OF THE TOP TEN.

12 IT'S NOT UNREASONABLE TO HAVE MORE THAN TEN AT ALL,  
13 BUT I JUST AM NOT WILLING -- IF THERE IS NO AGREEMENT, I AM NOT  
14 WILLING TO GIVE YOU A NUMBER AT THIS POINT.

15 **MR. JACOBSON:** HOW DO YOU WANT TO RECEIVE THAT, YOUR  
16 HONOR?

17 **THE COURT:** I ACTUALLY WOULD RATHER -- AGAIN, WITH  
18 THESE DISCOVERY ISSUES, I'M MORE INCLINED TO SEND THIS TO THE  
19 MAGISTRATE JUDGE HANDLING THE CASE, BECAUSE, FRANKLY, I GOT  
20 TIED UP IN A LOT OF THIS WITH TWO ROUNDS OF THIS ISSUE.

21 **MR. JACOBSON:** UNDERSTOOD.

22 **THE COURT:** AND IT WAS BURDENOME, FRANKLY.

23 THIRTY IS A LOT. I DON'T KNOW THAT IT'S  
24 INAPPROPRIATE IN THIS CASE.

25 **MR. JACOBSON:** I WOULD SAY THAT MARKET DEFINITION,

1 MARKET POWER THEMSELVES COULD BE TEN WITNESSES.

2 **THE COURT:** YEAH.

3 **MR. JACOBSON:** YOU KNOW, WE WOULD TRY TO AVOID THAT.

4 IN TERMS OF THE CLI, I SUSPECT THAT JUST A HAND FULL  
5 OF WITNESSES ARE GOING TO HAVE TO BE CALLED FOR VERY BRIEF  
6 DEPOSITIONS TO TALK ABOUT THE INDUSTRY NATURE OF THE STATEMENTS  
7 AND THE INDUSTRY NATURE OF THE REALIZE.

8 BUT, CERTAINLY, IT'S NOT IN OUR INTERESTS AND I'M  
9 GOING TO PLEDGE TO YOU RIGHT NOW THAT WE'RE NOT GOING TO ASK  
10 THE SAME QUESTIONS OF THE SAME PEOPLE. WE'RE JUST NOT GOING TO  
11 DO IT.

12 **MR. DESMARAIS:** I THINK WITH YOUR HONOR'S GUIDANCE WE  
13 CAN PROBABLY WORK SOMETHING OUT.

14 **THE COURT:** I THINK YOU CAN PROBABLY WORK IT OUT MOST  
15 OF THE WAY.

16 NOW, LET ME JUST ASK YOU. HAVE YOU GIVEN ANY THOUGHT  
17 TO WHETHER IT IS APPROPRIATE FOR A MAGISTRATE JUDGE TO HANDLE  
18 DISCOVERY IN THIS CASE OR WHETHER A SPECIAL MASTER IS MORE  
19 APPROPRIATE?

20 **MR. DESMARAIS:** I THINK THE MAGISTRATE PROBABLY CAN  
21 HANDLE IT. I THINK THE PARTIES IN THIS CASE ARE GOING TO GET  
22 ALONG FINE, YOUR HONOR. SO I DON'T THINK IT'S GOING TO BE A  
23 PROBLEM.

24 **THE COURT:** I APPRECIATE THAT, MR. DEMARAIS.  
25 FRANKLY, MY EXPERIENCE IS WHEN I HAVE BEFORE ME THE TOP LAWYERS

1       IN THE COUNTRY, I DON'T EXPECT PROBLEMS, BECAUSE YOU DIDN'T GET  
2 TO WHERE YOU ARE BY FIGHTING UNNECESSARY BATTLES, AND SO I  
3 APPRECIATE THAT.

4           ALL RIGHT. AND I -- YOU KNOW, TO THE EXTENT THAT MY  
5 INVOLVEMENT IN SOME OF THESE SKIRMISHES CAN BE HELPFUL, I  
6 ENCOURAGE YOU TO CONTACT ME. I'M MORE THAN GLAD TO HAVE A  
7 BRIEF TELEPHONE CONTACT IF IT CAN BE HELPFUL, AND THOSE I CAN  
8 GENERALLY SCHEDULE PRETTY EASILY BECAUSE I CAN DO THOSE AFTER  
9 HOURS.

10          IF YOU NEED TO GET ON TO CASE MANAGEMENT, WE TRY TO  
11 SCHEDULE THAT PRETTY EASILY AS WELL, BUT IT'S A LOT OF TRAVEL  
12 FOR ALL OF YOU. AND IF I CAN TAKE CARE OF IT BY PHONE AND A  
13 TWO-PAGE EXPLANATION OF THE PROBLEM, THAT'S EFFICIENT FOR  
14 EVERYBODY AND I LIKE TO DO THAT.

15           **MR. JACOBSON:** WE COULD ALSO INVITE YOU TO NEW YORK.

16           **MR. DESMARAIS:** I SAID THE SAME.

17           (SIMULTANEOUS SPEAKING.)

18           **THE COURT:** WELL, YOU KNOW, THAT'S ALWAYS A NICE  
19 THING. OH, ALL OF YOU. OKAY. IT WOULD HAVE ITS ADVANTAGES,  
20 WOULDN'T IT?

21           ALL RIGHT.

22           **MR. DESMARAIS:** THERE'S ONE OTHER --

23           **THE COURT:** OKAY.

24           **MR. DESMARAIS:** SO ON THE AMICUS?

25           **THE COURT:** OH, YEAH.

1                   **MR. DESMARAIS:** I WANTED TO INQUIRE WHAT THE COURT'S  
2 PREFERENCE IS. IF YOU ARE GOING TO ALLOW IT, WE'VE AGREED  
3 AMONGST US, AND I WOULD PROPOSE TO YOU HOW TO HANDLE IT, BUT IF  
4 YOU'RE NOT GOING TO ALLOW IT, THEN WE DON'T NEED TO --

5                   **THE COURT:** WELL, MY FIRST REACTION WHEN I -- AND I  
6 HAVEN'T LOOKED AT THE AMICUS ITSELF, BUT WHEN IT CAME IN, IT'S  
7 NOT ATTACHED TO ANYTHING AND SO IT'S NOT APROPOS OF ANY ISSUE  
8 BEFORE ME.

9                   **MR. DESMARAIS:** I AGREE WITH YOU. I THINK THAT  
10 AMICUS IS A GENERAL PROPHECY ON THE LAW. IT'S NOT TAILORED TO  
11 THE ISSUE YOU ARE GOING TO BE DECIDING, SO I DON'T KNOW IF IT'S  
12 RELEVANT TO ANYTHING.

13                  **MR. JACOBSON:** YOUR HONOR --

14                  **THE COURT:** I WISH I HAD TIME FOR THAT MUCH READING,  
15 BUT, FRANKLY --

16                  **MR. JACOBSON:** CAN I --

17                  **THE COURT:** THAT'S TOUGH.

18                  **MR. JACOBSON:** CAN I EXPLAIN WHY I THINK IT'S  
19 IMPORTANT AND HELPFUL?

20                  THE BRIEF DOES NOT TAKE ANY POSITION ON ANY OF THE  
21 ISSUES IN THE CASE. IT DOESN'T TAKE AN ISSUE POSITION ON  
22 TWOMBLY. IT DOESN'T IF TAKE AN ISSUE ON THE BUNDLING OR  
23 INTIMIDATION ASPECTS.

24                  WHAT IT DOES SAY IS THAT IF THE FACTS ALLEGED IN THE  
25 COMPLAINT ON THE CLI ASPECT OF THE CASE ARE TRUE, THAT THAT IS

1 COPYRIGHT HOLDUP AND CAUSES THE SAME INDUSTRY-WIDE HARM THAT  
2 YOU SEE IN THE STANDARD ESSENTIAL PATENTS CASES AND CASES LIKE  
3 THAT.

4 IT'S PURELY SUBMITTED IN THE PUBLIC INTEREST. IT  
5 FAVERS US, WHICH I ALSO BELIEVE IS IN THE PUBLIC INTEREST.  
6 BUT, YOUR HONOR, I THINK YOU WILL FIND IT INFORMATIVE, AND I  
7 WOULD ENCOURAGE YOU AT LEAST TO TAKE A LOOK AT THE MOTION FOR  
8 LEAVE WITH AN OPEN MIND.

9 **THE COURT:** AND, MR. DEMARAIS, ARE YOU GOING TO  
10 OPPOSE IT?

11 **MR. DESMARAIS:** WELL, SO --

12 **THE COURT:** -- OR SCOUR UP SOMETHING THAT GIVES THE  
13 OTHER VIEW?

14 **MR. DESMARAIS:** YES. LET ME EXPLAIN WHY I THINK IT'S  
15 WASTE OF THE COURT'S RESOURCES TO EVEN REVIEW IT. I DON'T  
16 DISAGREE WITH MR. JACOBSON AS TO WHAT IT COVERS. THAT'S NOT  
17 BEEN BRIEFED, RIGHT? OUR MOTION TO STAY AND/OR DISMISS IS NOT  
18 ABOUT WHETHER IF EVERYTHING IN THE COMPLAINT IS TRUE, WHETHER  
19 THERE'S A CLAIM.

20 OUR MOTION TO DISMISS IS ABOUT THEY HAVEN'T BEEN  
21 SUFFICIENTLY PLED AND HAVEN'T SUFFICIENTLY -- YOU KNOW, HAVE A  
22 BASIS FOR THAT CLAIM.

23 SO THE AMICUS BRIEF IS REALLY ABOUT A DISPUTE WE'RE  
24 NOT HAVING. ALL YOU NEED TO DECIDE TO DECIDE THE MOTION TO  
25 DISMISS IS DID THEY PROPERLY PLEAD THAT CLAIM, IS THERE A

1 FACTUAL BASIS FOR THE THINGS THEY'RE SAYING. WE'RE NOT TAKING  
2 ISSUE WITH THE FUNDAMENTAL IDEA THAT IF ALL OF THOSE -- IF WE  
3 DID ALL THOSE THINGS THEY SAID, THERE'S A TRIABLE CLAIM HERE.  
4 WE'RE NOT TAKING THAT ISSUE.

5 YOU KNOW, IF YOU WANT US TO RESPOND TO THE BRIEF,  
6 WHAT WE WOULD SAY IS IT'S NOT RELEVANT TO ANY ISSUE BEFORE THE  
7 COURT, AND IT'S NOT HELPFUL. SO...

8 **MR. JACOBSON:** YOUR HONOR, COULD I ADDRESS THAT,  
9 BECAUSE THAT IS FUNDAMENTALLY WRONG.

10 SO THE BASIS OF THE MOTION TO DISMISS, AT LEAST ON  
11 THE CLI ASPECT OF THE CASE, IS THAT WE HAVE AN ALLEGED FRAUD.  
12 AND WHAT OUR OPPOSITION BRIEF EXPLAINS AND WHAT THE AMICUS  
13 EXPLAINS IS THAT FRAUD IS NEVER AN ELEMENT IN A CLAIM SUCH AS  
14 THIS. THIS IS A CHANGE OF POLICY CASE. IT IS NOT A FRAUD  
15 CASE. AND WHETHER THERE WAS INTENT AT THE TIME THAT CLI WAS  
16 MADE INDUSTRY STANDARD BY CISCO IS NOT RELEVANT.

17 IF CISCO HAD NO INTENTION OF CHANGING POLICY WHEN IT  
18 FIRST DID THIS, THAT DOESN'T NEGATE THE ANTITRUST CLAIM FROM  
19 THE FACT THAT IT LATER DID. AND THAT IS WHAT I BELIEVE THE  
20 AMICUS BRIEF WILL BE HELPFUL TO YOU IN EVALUATING.

21 **THE COURT:** SO IF THE AMICUS BRIEF IS SUBMITTED IN  
22 SUPPORT OF THE MOTION TO DISMISS, THAT PUTS IT IN A DIFFERENT  
23 LIGHT.

24 **MR. JACOBSON:** WELL, IT'S IN OPPOSITION.

25 **THE COURT:** IN OPPOSITION, RATHER. SORRY.

1           BUT I THOUGHT IT WAS JUST FILED AS: HERE'S AN AMICUS  
2 BRIEF.

3           **MR. JACOBSON:** IT IS MORE THAN THAT, YOUR HONOR. IT  
4 CAREFULLY DECIDES NOT TO TAKE A POSITION --

5           **THE COURT:** YEAH.

6           **MR. JACOBSON:** -- ON WHETHER WE HAVE ENOUGH FACTUAL  
7 MATTER IN OUR COMPLAINT. WE DO, BUT THAT'S FOR US TO BRIEF.

8           WHAT IT DOES SAY IS THAT THE LEGAL APPROACH TAKEN TO  
9 THE CLI ASPECT OF THE CASE AND CISCO'S MOTION IS UNSOUND, AND I  
10 THINK YOUR HONOR WILL FIND THAT VERY HELPFUL.

11          **THE COURT:** WELL, MR. DEMARAIS, DID YOU WANT TO --  
12 WERE YOU GOING TO OPPOSE THE ADMINISTRATIVE MOTION IN WRITING?

13          **MR. DESMARAIS:** WHAT I WAS GOING TO SUGGEST, YOUR  
14 HONOR, IS -- AND I HAVE SPOKEN TO MR. JACOBSON, AND WE'RE IN  
15 AGREEMENT ON IT, IS THIS -- WHICH SHOWS YOU WE CAN AGREE ON  
16 SOME THINGS.

17          IF YOUR HONOR IS GOING TO REVIEW THE AMICUS BRIEF,  
18 MR. JACOBSON HAS CONSENTED TO GIVE US FIVE EXTRA PAGES IN OUR  
19 REPLY.

20          **THE COURT:** OH, WELL. THEN YOU'VE ANSWERED MY  
21 QUESTION. I'M NOT GOING TO ACCEPT IT. I AM NOT. I'M SORRY,  
22 BUT THERE IS -- YOU WILL BE DIVERTING MY ATTENTION FROM THE  
23 MOTION, AND I NEED TO DECIDE THE MOTION, AND I WILL NOT TAKE  
24 EXTRA ON IT. IT'S JUST NOT GOING TO HAPPEN. SO I THINK THAT  
25 TAKES CARE OF THAT.

1           AND I THINK TO THE EXTENT THOSE ISSUES ARE OF VALUE,  
2 THEY CAN BE ARGUED ON THE DAY OF THE HEARING, BUT I AM JUST NOT  
3 GOING TO OPEN THE DOOR TO FURTHER BRIEFING ON THE ISSUE. YOU  
4 FILED YOUR MOTION TO DISMISS.

5           **MR. DESMARAIS:** YES.

6           **THE COURT:** AND IT'S BRIEFED, AND THAT'S WHERE WE'RE  
7 GOING TO LET IT GO. ALL RIGHT.

8           **MR. DESMARAIS:** THANK YOU, YOUR HONOR.

9           **MR. JACOBSON:** THANK YOU, YOUR HONOR.

10          **THE COURT:** WELL, I REALLY APPRECIATE BOTH OF YOU  
11 BEING HERE. IT'S REALLY A PLEASURE TO MEET BOTH OF YOU. I  
12 KNOW -- I KNOW THIS CASE IS -- EACH OF THESE CASES IS REALLY  
13 QUITE EXTENSIVE. AND IT WAS CLEAR TO ME WHEN I DID NOT ALLOW  
14 THE ANTITRUST CLAIM TO BE AN AMENDED COUNTERCLAIM TO THE CLI  
15 CASE THAT THIS -- THAT THAT WAS IMPORTANT. AND I CAN SEE NOW  
16 THAT THIS IS REALLY SO MUCH BIGGER THAN EVEN I IMAGINED WHEN I  
17 FIRST SAW IT.

18          SO ALL RIGHT. I THINK YOU HAVE SOME BASIC DATES THAT  
19 YOU CAN DEAL WITH. I TYPICALLY DON'T GO AHEAD AND SET FURTHER  
20 CASE MANAGEMENT. THE TIMING TENDS TO BE ARBITRARY. I THINK  
21 THIS IS A CASE THAT WOULD BENEFIT FROM CASE MANAGEMENT, BUT I'M  
22 GOING TO ASK THAT YOU PROMPT WHEN IT IS BENEFICIAL.

23          I WILL ASK THAT WITHIN THE NEXT 14 DAYS YOU WORK OUT  
24 THAT SCHEDULE AND SEND ME A STIPULATION AND ORDER ON THAT. AND  
25 AS ISSUES COME UP -- AND CERTAINLY, MR. JACOBSON, IF OUR DATE

1 FOR THAT SUMMARY JUDGMENT MOTION STILL INTERFERES, YOU'LL LET  
2 ME KNOW RIGHT AWAY, AND WE'LL WORK SOMETHING OUT.

3           **MR. JACOBSON:** I WILL ACTUALLY LET YOU KNOW RIGHT  
4 AWAY.

5           **THE COURT:** AND THOSE APRIL DATES, IF YOU JUST GIVE  
6 MR. DEMARAIS A CALL AND GET BACK TO ME WITH SOME SUGGESTED  
7 DATES, THAT WILL BE GREAT.

8           **MR. JACOBSON:** WE ARE TRYING TO GET JUSTICE BREYER TO  
9 APPEAR AT THAT MEETING, YOUR HONOR, SO I HOPE THAT HAPPENS.

10          **THE COURT:** THAT WOULD BE NICE. THAT'S WORTH YOUR  
11 EFFORT. THANK YOU BOTH.

12          **MR. DESMARAIS:** THANK YOU, YOUR HONOR.

13          **THE COURT:** ALL RIGHT.

14 (PROCEEDINGS ADJOURNED AT 11:53 A.M.)

15  
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## **CERTIFICATE OF TRANSCRIBER**

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT  
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF  
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE  
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE  
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE  
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,  
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN  
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT  
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE  
ACTION.

*mcolumbi*

JOAN MARIE COLUMBINI

MAY 29, 2016